INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	18
APPENDIX A, OPINION OF DISTRICT COURT	19
APPENDIX B, OPINION OF COURT OF APPEALS	27

TABLE OF CASES

Fidelity and Deposit Company vs. Harris, 9 Cir., 360 F.2d 402 13-15

Clifford F. MacEvoy Co. vs. United States for the Use of Tomkins Co., 322 U.S. 102, 64 S. Ct. 890, 88 L.Ed 1163 ..... 8-14, 16

Seaboard Surety Co. vs. United States for the Use of Marshall-Wells Co., 9 Cir., 84 F.2d 348. 16

United States for the Use of Mutual Metal Mfg. Co. vs. Biggs, D.C., E.D. Ill., 46 F.Supp. 8 16

United States for the Use of Powers Regulator Company vs. Hartford Accident and Indemnity Co., 1 Cir., 376 F.2d 811 ..... 13-15, 17

STATUTE CITED

Miller Act, 40 U.S.C.A. 270a and 270b 3, 4

RULE CITED

Federal Rules of Civil Procedure, Rule 15(b) 18

IN THE

Supreme Court of the United States

No. .....

GLENS FALLS INSURANCE COMPANY and
DMH ENTERPRISES, INC.,

Petitioners

versus

THE UNITED STATES OF AMERICA FOR THE
USE OF NEWTON LUMBER AND MFG. CO.
and PERFECTION TRUSS CO.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment entered in this case on October 24, 1967, by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The District Court rendered a memorandum opinion, which has not been reported. This opinion of the District Court is attached as "Appendix A". The opinion of the Court of Appeals has not yet been reported; a copy thereof is attached as "Appendix B".

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered October 24, 1967. Earlier, a Petition for Rehearing had been filed directed to opinion and judgment entered September 6, 1967, and October 12, 1967 Order was entered recalling and withdrawing opinion for purposes of correction. Revised opinion was filed October 24, 1967, and the Petition for Rehearing directed to the earlier opinion was denied on that date. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254.

QUESTIONS PRESENTED

1. Based upon the written contracts of each contractor, the one to whom Respondents supplied material was a sub-subcontractor who contracted with a direct subcontractor of the government's prime contractor, which would have made Respondents too remote from the prime contractor to have an action on his bond furnished under the Miller Act. The question is whether the contract of the subcontractor with the prime contractor could properly be stricken out as a sham and the suppliers of his sub-subcontractor thereby given bond coverage, where the contractor had paid the subcontractor and the subcontractor had paid the sub-subcontractor, the government had approved and recognized the subcontractor and the District Court recognized that he had devoted substantial time and effort in connection with performance of his subcontract and ultimately completed the contract of the sub-subcontractor to his own account and loss after it had been defaulted.

2. Whether the Court of Appeals could properly affirm the conclusion of the District Court that the written contract was a sham upon the ground that it was a finding of fact to be upheld unless clearly wrong, where fraud by the prime contractor was neither alleged, proved, nor

found by the court and the striking out of the subcontract was an exercise of general equity power by the court in a statutory Miller Act proceeding.

3. Whether suppliers should not be estopped to assert continued reliance upon an initial belief that the sub-sub-contractor they supplied was a direct subcontractor, where after learning his true contractual status they continued to supply him and thereafter created the balances for which they brought action against the Miller Act bond.

4. Whether the Court of Appeals should have ignored the merits of the defense of estoppel upon the ground that it was not set forth in any "formal amendment" or "formal pleading" where Rule 15, Federal Rules of Civil Procedure, provided that issues tried should be treated as raised in the pleadings and permitted amendment on motion at any time, and where such motions were made and granted by the District Court to conform pleadings to the evidence.

STATUTES INVOLVED

The "Miller Act", 40 U.S.C.A., Sec. 270a and 270b provides in part:

> "40 U.S.C.A., Sec. 270a. Bonds of contractors for public building or works * * *
>
> (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':
>
> ***
>
> (2) A payment bond with a surety or sure-

ties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.

***

Sec. 270b. Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of the period of ninety days after the day on which the last of the labor was done or performed by him or material furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, * * * "

STATEMENT

Petitioner DMH Enterprises, Inc. was the prime contractor with the Air Force to construct a housing project at ENT Air Force Base, Colorado. The prime contract was dated March 27, 1964 (Pl. Ex. 1) [351]. *(Note: References to the certified record appear in parenthesis throughout this petition, followed by bracketed references to the reproduced record since copies thereof are being furnished by the Clerk of the Court of Appeals.)* Under date of April 20, a written subcontract (Def. Ex. A) [358] was entered into between DMH Enterprises, Inc. and Earl M. Campbell dba Construction Industries of Colorado for the carpentry and mill work and weatherstripping and thresholds of the project.

Campbell was a dentist in Minneapolis engaged part-time in building houses and desirous of going into the construction field (R.385-6) [187-8], who had brought the invitation for bids on the ENT housing project to the attention of Darrell M. Hills, president of DMH Enterprises, Inc. who was married to a sister of Campbell's wife (R.287) [131].

Hills knew that Campbell intended to sublet his subcontract in its entirety (Def. Ex. QQ) [396], and while Campbell was engaged in disposing of his dental practice in Minneapolis (R.387) [188], Hills put Whiteside (Whiteside Construction Co.), who had contacted him, in touch with Campbell by telephone (R.244, 389-331) [108, 189-190].[1] Under date of May 6, 1964, Whiteside signed a contract with Campbell (Def. Ex. B) [368] to perform the carpentry work called for under the contract that he "presumed"

---

[1] Although the Court of Appeals' opinion dates Whiteside's approach to Hills as "prior to April 2" and treats succeeding transactions between them as having occurred before the Campbell subcontract of April 20, we have followed the chronology agreed upon by Whiteside (R.240-241) [107]; Hills (R.289) [132] and Campbell (R.389) [189], which is the only order consistent with the finding of the District Court that when Hills was contacted by Whiteside "he referred Whiteside to Campbell as the subcontractor" (Appendix A, infra, p. 21) [41].

Campbell had with Hills (R.271) [122]. When Whiteside found that he was unable to get the bond that Campbell expected of him (R.391, 268) [190, 120], Campbell required as an alternative the protection of withholding payment of his estimates for thirty days and a promissory note as security for performance (R.392-393, Def. Ex. B, Sec. 12) [190-191, 372].

During the performance of the work, by Whiteside and by another contractor, to whom he had sublet the rest of his subcontract, Campbell head-quartered at the site of the work in a trailer which he rented from DMH (R.411) [200]. Although Campbell's name was submitted by DMH to the Air Force and approved by it, as a subcontractor of the prime contractor, whereas the name of Whiteside was not so submitted or approved (R.483-484) [240-241]; and although on the Government's Organizational Chart (Def. Ex. C) [379] Campbell was shown (by his business name "Construction Industries of Colorado") as a subcontractor of the prime contractor, whereas Whiteside was shown as a sub-subcontractor under Campbell; and whereas the Government's project engineer recognized and treated Campbell as a direct subcontractor and Whiteside as a second-tier subcontractor (R.446-447) [218-219]; Newton Lumber and Manufacturing Company and Perfection Truss Company (the Use Plaintiffs herein) who supplied material to Whiteside, had the impression for some time that Whiteside was a direct subcontractor of DMH (Appendix A, infra, p. 24) [43].

As the work progressed, the prime contractor DMH paid its subcontractor Campbell according to the terms of his contract (R.409-410) [199-200] and, until Whiteside defaulted in performance, Campbell paid Whiteside according to the latter's contract (R.571-573) [266-267]. When Whiteside defaulted and was terminated by Campbell on De-

cember 18, 1964, he left substantial balances unpaid to his suppliers, Use Plaintiffs Newton and Perfection (R.574-575) [267-268]. Campbell completed the work remaining to be done under the Whiteside subcontract at a substantial loss to himself represented by the excess cost of his completion over what it earned him on his own contract with DMH (R.408-410) [199-200].[2]

Use Plaintiffs Newton and Perfection joined in a complaint (R.1) [3] against Whiteside as well as against DMH and the surety on its Miller Act bond, Glens Falls;[3] they claimed a right to recover Whiteside's unpaid balances from the prime contractor's bond upon their assertion that Whiteside was a subcontractor of prime contractor DMH. When they had first contacted Darrell M. Hills with a view to supplying the job they had been told that Whiteside was the one to see, that he was the carpentry subcontractor, and in trial of their lawsuit Use Plaintiffs insisted that in supplying material to Whiteside they were relying upon the credit of DMH and its surety, and that they did not learn of the true contractual relationships until about the end of August, 1964 (R.152, 199, 166-169, 218) [60, 85, 67-68, 94].

Both Use Plaintiffs did admit that after they came to know of the contractual relationships they nevertheless continued to supply Whiteside with each furnishing materials in amount greater than the balances Whiteside left unpaid and for which they sued. (Int. No. 10, R.72 [30], Ans. No. 10, R.84 [39], made part of record R.96 [45], R.168-169 [68]).

---

[2] Whiteside had encountered serious difficulties in the quality of work that he performed resulting in stop orders and extensive removal and re-doing of work (R.449-455, 459-463) [220-224, 225-228], with heavy cost to him in labor and materials (R.598-601) [282-284], and as the end of the job approached all deficiencies which Whiteside had left had to be corrected (R.462) [228].

[3] Suit was in the United States District Court as provided in (b) of 40 U.S.C.A. 270b.

Although the opinion and order of the District Court stated that Campbell was approved by the Air Force as the subcontractor, that he appeared as such on the contractor's organizational chart, devoted substantial time and effort in connection with performance, with formal orders regularly going from Campbell to Whiteside, and that Campbell ultimately terminated Whiteside, completed his contract and suffered a loss; the Court concluded that it was "apparent from the evidence that there was a studied effort on the part of Hills to insulate himself from the suppliers to the subcontractor of the framing and carpentry work", in turn concluding that the contract between DMH and Campbell was a "sham", that Whiteside was "in substance" the contractor, that Campbell was a guarantor or surety and that it followed that the Use Plaintiffs came within the terms and scope of the Miller Act (Appendix A, infra, p. 26) [44].

REASONS FOR GRANTING THE WRIT

The decision of this Court in *Clifford A. MacEvoy vs. United States for the Use of Tomkins Co.*, 322 U.S. 102, 64 Sup. Ct. 890, 88 L.Ed. 1163, stated the intent of the Miller Act, with respect to the payment bond required of government prime contractors, that the bond protects subcontractors contracting directly with the prime contractor and those having a direct contractual relationship with such subcontractors, but that, for cogent policy reasons there set forth, such bond affords no protection to those in more remote relationships, so that clearly under the *MacEvoy* rule suppliers of a sub-subcontractor, having no direct contract with the prime contractor, are not covered.

Ignoring *MacEvoy*, and in direct conflict with it, the decision below has granted recovery on a Miller Act bond to suppliers of a sub-subcontractor although both the con-

tracts of subcontractor and sub-subcontractor were express and written, the prime paid the subcontractor and the subcontractor paid the sub-subcontractor, so that the recovery permitted will force double payment from the prime contractor. The rule in *MacEvoy* was based upon the purpose of the Miller Act to prevent the risk of such double payments falling upon government contractors which would result from extending the coverage of their bonds beyond the limits which *MacEvoy* found in the Miller Act provisions.

If permitted to stand, the decision below will be an exception to the *MacEvoy* rule in favor of remote suppliers to sub-subcontractors who have some appearance of being direct subcontractors because they perform work on the project while the direct subcontractor above them does not. As in the case at bar such an exception will reward the careless who fail to take the trouble to find out if those they would supply are direct subcontractors, thereby imposing the risk of unlimited liability and double payment upon government contractors which *MacEvoy* sought to prevent.

The decision below cannot properly be distinguished from conflicting decisions of the Courts of Appeal for the First and Ninth Circuits upon the ground that here the District Court concluded that the prime contractor intended to insulate himself from liability to the suppliers of the contractor performing the carpentry work. Since the Miller Act and *MacEvoy* rule sanction such insulation from liability as desirable for reasons of policy, the existence of such an intent to benefit from it cannot, in and of itself, be wrongful. A finding of such intent should not be substituted, as it has in the case at bar, for pleading, proof and finding of fraud on the part of the prime contractor where there has never been any contention that he sought

to avoid paying the price of his subcontract, where he has paid such price in full and the effect of the decision would be to compel him to pay double insofar as a substantial part of material is concerned, and to do so in order to protect suppliers who delivered the material to a sub-subcontractor after they had learned that he was not a direct subcontractor.

1. The decision below completely ignores the controlling decision of this Court with which it is in conflict, *Clifford A. MacEvoy Company vs. United States for the Use of Tomkins Co.*, 322 U.S. 102, 64 Sup. Ct. 890, 88 L.Ed. 1163. Thus the *MacEvoy* case is not even cited or mentioned, either in the opinion of the District Court or that of the Court of Appeals; yet the effect of these opinions is to offer a rationale for the avoidance of the *MacEvoy* rule where the suppliers of a remote sub-subcontractor rely upon the appearance that he is a direct subcontractor, especially in circumstances where the direct subcontractor is not performing work on the job site when the supply is accomplished. Since it is common in the more important federal works for contracts to be let in several tiers, the result of the adoption of this rationale in other cases will have the effect of destroying the virtues of certainty and uniformity which underly the rule adopted by this Court in *MacEvoy*, and will cause government contractors to pay twice, once to the subcontractor, and again to the unpaid suppliers of the sub-subcontractor as here.

MacEvoy presented the Court with the occasion to define the word "subcontractor" as used in the Miller Act and accordingly to delineate the scope of coverage under the payment bond which that act requires of the prime contractor. Noting (in note 5 to the case) the expression of the framers of the act that a sub-subcontractor might avail himself of the protection of the bond by giving no-

tice to the contractor but that it was not felt that more remote relationships ought to come within the purview of the bond, the opinion concluded that "subcontractor" in the act means one having a direct contract with the prime contractor and does not include more remote subcontractors so that the protection of the bond extends only so far as suppliers or sub-subcontractors having direct contractual relationship with such a "subcontractor".

Of particular relevance to the case at bar are the "practical considerations underlying the Act" which this Court discussed in support of its conclusion. Noting that the prime contractor could protect himself by requiring his direct subcontractors to furnish security that they would pay those who dealt with them, the opinion concluded that to go further and impose unlimited liability under the payment bond was to create "a precarious and perilous risk on the prime contractor and his surety". This risk would be that while the contractor could insure that the subcontractors paid by him would pay their sub-subcontractors and suppliers, it would not be possible, as a practical matter, for the prime contractor to be sure that once the sub-subcontractor, in no privity of contract with him, was paid that he in turn would pay those who supplied him labor and material. Thus, to expose the prime contractor to unlimited liability to all suppliers of labor, material or subcontract services would place the prime contractor in the position of an insurer rather than that of principal on a bond.

It is significant that the decision in the case at bar subjects the prime contractor to the very risk that *MacEvoy* sought to avoid. Thus DMH, prime contractor paid the agreed contract price to its subcontractor Campbell, (R. 409-410) [199-200] and Campbell paid sub-subcontractor Whiteside in accordance with his contract, (R.571-573)

[266-267] but Whiteside failed to pay his suppliers, the Use Plaintiffs Newton and Perfection (R.574-575) [267-268]. Thus, the result of the decision is to force the prime contractor to pay twice.

It is apparent that the rule in *MacEvoy* could be in no way dependent upon whether the subcontractor retains some work for performance by employees of his own or, on the other hand, subcontracts all parts of the work to sub-subcontractors. Nevertheless it is clear that this factor in the case at bar very substantially influenced the District Court, thus,

> "The Court: They tell me Campbell had no suppliers. This would be a great way to avoid the Act altogether, as far as the suppliers are concerned, just get another subcontractor. It just ditches the Act altogether doesn't it?" (R.144) [55].

It is likewise apparent in the case at bar that the initial belief of the Use Plaintiffs that Whiteside was the subcontractor was a misconception which also arose out of the fact that Campbell had sublet all of his work and that Whiteside was commonly referred to as the subcontractor performing the framing (R.152, 199) [60, 85]. No contention was ever made that either DMH, Campbell or Whiteside represented to either Newton or Perfection that Whiteside had a subcontract directly with DMH; and clearly no such representation was ever made (R.216, 217) [93].

Manifestly, if the decision below stands, it will furnish to suppliers, too remote by the standards of *MacEvoy*, a ready way around the intent of Congress in the Miller Act, since much of the work on large federal projects is performed by sub-subcontractors, remote from the prime contractor, whose suppliers will not know whether they are dealing

with one having a subcontract directly with the prime contractor unless they act prudently and take the trouble to find out from the contracting officer, government supervisors or the parties themselves. Thus this exception to the rule will favor those who are not vigilant in their own protection and it is easy to forecast will result in greatly increased litigation. The risk of double payment that it imposes upon government contractors will inevitably increase the cost of government construction, and cause the very delays in payment of remote subcontractors and suppliers that the Miller Act was designed to eliminate as explained in footnote 4 of the *MacEvoy* decision.

2. The decision below is in conflict with *Fidelity and Deposit Company vs. Harris,* 9 Cir., 360 F.2d 402, and *United States for the Use of Powers Regulator Company vs. Hartford Accident and Indemnity Co.,* 1 Cir., 376 F.2d 811. Certain incidental and non-controlling aspects of the case at bar recited in the opinions below do not serve to distinguish it from these decisions. The decision reflects serious basic error in law and the Court of Appeals was not warranted in affirming the District Court under the rule relating to the findings of trial judges, that they not be set aside unless clearly erroneous. The conclusion of the District Court that Campbell's contract with DMH was a sham, was not a finding of fact where fraud was neither pleaded, proved nor found and was beyond the jurisdiction of the Court in a Miller Act proceeding.

In the *Harris* case, supra, the Court of Appeals for the Ninth Circuit was asked to drop from a chain of contractors, the subcontractor, Harris, all of whose work had been performed by a sub-subcontractor, Yost, to whom Use Plaintiff Paramount supplied. It was contended that Harris was a mere "paper subcontractor" because he subcontracted all of his work.

The Court of Appeals for the Ninth Circuit reasoned that a departure from the clarity and conciseness of the rule in *MacEvoy* would result in manifold difficulties, and that the "virtues of certainty and uniformity in the law advanced by the *MacEvoy* interpretation of the Miller Act outweigh the alleged benefits of the enlarged scope of bond protection afforded by other interpretations of the language and holding of the *MacEvoy* case." (360 F.2d 409). The court refused to hold Harris to have been merely an agent of the prime contractor in delegating the work to others because of the "evident tendency it would have to destroy the *MacEvoy* rule as we have adopted it." (360 F.2d 411).

In marked contrast to the concern of the Court of Appeals for the Ninth Circuit for the integrity of the rule of *MacEvoy* is the opinion of the District Court in the case at bar, ignoring *MacEvoy*, finding Campbell to have been "in effect an agent for Hills" and that:

> "[T]he case at bar is a classic one for protection of the suppliers and the question is whether the intervention of this additional person, Dr. Campbell, together with the formal written contract executed by him, deprives the plaintiffs of a remedy." (Appendix A, infra, p. 25) [43-44].

The *Powers Regulator Company* case, supra, involved a Use Plaintiff who mistakenly believed that sub-subcontractor DeGroot Heating, Inc. with whom he contracted was the same as direct subcontractor Edward DeGroot, Inc. It was urged that the circumstances were such as to bring the case within the sham or alter ego doctrine. The Court of Appeals for the First Circuit refused, stating that it saw "no reason why Powers should be permitted to obtain through its own carelessness protection to which it would

not have been entitled had it acted prudently." (376 F.2d 812).

The circumstances in the case at bar no more warrant an exception to the *MacEvoy* rule than did those of the *Harris* and *Powers Regulator Company* cases. The Use Plaintiffs below neither alleged nor proved that the prime contractor had any intent to defraud them. Thus they alleged only that they had a right to recover on the contractor's bond because they dealt with a subcontractor, and their proof went only to show that circumstances led them to believe for a time that Whiteside was a subcontractor. It is true that the District Court concluded "that there was a studied effort on the part of Hills to insulate himself from the suppliers to the subcontractor of the framing and carpentry work" (Appendix A, infra, p. 25) [44], and the Court of Appeals, treating this as a finding of fact, affirmed under the rule that findings by a trial court will not be set aside unless clearly erroneous.

That this was not a finding of fact but an erroneous conclusion of law is immediately apparent when it is applied as a general rule for liability under Miller Act bonds. Under such a rule any contractor who let part of the work to a subcontractor knowing his intention further to sub-let in whole or in part, would thereby be exposed to liability on his bond which was never intended by Congress. So long as the contractor pays his subcontractors it matters not whether he desires insulation from remote suppliers, for that is exactly what the Miller Act gives him.

The only facts noted by the District Court which are essentially different from the situation presented in the *Harris* and *Powers Regulator Company* cases are immaterial; Campbell's limited experience as a contractor, his relationship with Hills and the assistance rendered to him by Hills in the negotiation of his contract with Whiteside.

Also mentioned is a design on "everyone's part to save bond fees among other things", (Appendix A, infra, p. 25) [44] without analysis of what significance this would have. The only bond required by the Miller Act was furnished and as the discussion in *MacEvoy* makes perfectly clear, it is up to the prime contractor whether or not to take security against the risk of non-payment by his subcontractor. That risk taken in the case at bar caused no loss to anyone since Campbell performed his payment obligation to Whiteside.

Not only was there no allegation or proof of fraud, there was no finding of it and fraud is not mentioned in either opinion herein. Both opinions contain statements concerning the broad remedial purpose of the Miller Act to protect suppliers, ignoring the opinion in *MacEvoy* that this policy does not justify imposing wholesale liability on payment bonds nor disregard of the limitations on liability which Congress intended to impose. Stripped of these statements, the opinions rely entirely upon the equitable maxim of regard for substance and not form by way of authority for the action of the District Court.

It has been held that in cases under the Miller Act and its predecessor, the Heard Act, courts have no general equitable jurisdiction. *Seaboard Surety Co. vs. United States for the Use of Marshall-Wells Co.*, 9 Cir., 84 F.2d 348; *United States vs. Biggs,* D.C., E.D. Ill., 46 F.Supp. 8. Accordingly, this case also presents the question of the correctness of this doctrine.

3. The decision herein gives protection to the suppliers against loss from their own carelessness to which they would not have been entitled if they had acted prudently.

Thus the District Court, after finding that the Use Plaintiffs firmly believed at the outset that Whiteside was the subcontractor, found that they later realized that Camp-

bell had some function although they "never were fully aware of his exact contractual status" (Appendix A, infra, p. 24) [43]. Nevertheless, the Court found that Use Plaintiffs became aware of the fact that Campbell had some contractual obligations in August, 1964 but still continued to supply material to Whiteside (Appendix A, infra, p. 22, 23) [42]. It was clear from the testimony of the Use Plaintiffs' general managers that after they had been told by Hills in August that Campbell was the subcontractor, that Hills was paying him and that he was paying Whiteside, (R.168, 218) [62, 94] they continued to supply Whiteside with materials which exceeded in value the balances for which they sued herein (R.155, 166-167, 3, 98, 72, 84, 218) [62, 67-68, 5, 46, 30, 39, 94].

There was no dispute in the evidence on this matter and the District Court granted written motions of Petitioners DMH and Glens Falls to amend their answers "by adding thereto the defense of estoppel, as grounds therefore stating that such amendment is necessary to make the pleadings conform to the evidence". (Motion granted - (R.96) [45] - the motions themselves appear as a supplement to the certified record herein.)

The original opinion of the Court of Appeals disposed of the estoppel defense by the statement that Petitioners did not plead estoppel and "did not seek leave at any time to amend their pleadings". In the final revised opinion (Appendix B) this statement was eliminated and the Court of Appeals rested its disregard of the merits of the defense upon the ground that there was no "formal pleading" and that the defense "was not pleaded, was not timely asserted, and was not established by the evidence adduced at trial".

Insofar as the merits are concerned this conclusion of the Court of Appeals is in direct conflict with the *Powers*

Regulator Company case, supra; and insofar as the procedural ruling is concerned it is not only contrary to the action of the District Court in granting the motion to amend, but also in its insistence upon a formal amended pleading the Court of Appeals below has ignored and refused the automatic amendment without formalities provided for in Rule 15(b) of Fed. Rules Civ. Proc.:

> "(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. * * * "

CONCLUSION

For the reasons stated, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

WALTON AND TAMMEN
Attorneys for Petitioner DMH Enterprises, Inc.

WELLER, FRIEDRICH AND HICKISCH
Attorneys for Petitioner Glens Falls Insurance Company

Roger T. Tammen
Norman E. Walton
Martin J. Andrew
H. Gayle Weller

Of Counsel

APPENDIX A

In the United States District Court

FOR THE DISTRICT OF COLORADO

Civil Action No. 9020

THE UNITED STATES OF AMERICA for the use and benefit of NEWTON LUMBER & MFG. CO., a corporation, and PERFECTION TRUSS CO., a corporation,

Plaintiffs,

v.

DMH ENTERPRISES, INC., a corporation; WHITESIDE CONSTRUCTION COMPANY, INC., a corporation, and GLENS FALLS INSURANCE COMPANY, a corporation,

Defendants.

Messrs. Horn, Anderson and Johnson, Attorneys at Law, 501 Mining Exchange Building, Colorado Springs, Colorado, for Newton Lumber & Mfg. Co.; Messrs. Love, Cole and Murphy, 406 Mining Exchange Building, Colorado Springs, Colorado, for Perfection Truss Co., Inc.; Messrs. Walton and Krueger, 2343 East Platte Avenue, Colorado Springs, Colorado, for DMH Enterprises, Inc.; Mr. Leslie A. Gifford, Attorney at Law, 1549 Emporia Street, Aurora, Colorado, for Whiteside Construction Co.; Messrs. Weller, Friedrich and Hickisch, 900 Capitol Life Center, Denver, Colorado, for Glens Falls Insurance Company.

MEMORANDUM OPINION AND ORDER

DOYLE, Judge.

The action herein arises under the Miller Act. The use plaintiffs, suppliers to an Air Force housing project at Ent Air Force Base near Colorado Springs, seek a recovery against DMH Enterprises, Inc., the prime contractor on a job. The contract which was let in March, 1964, called for the construction of some 200 housing units. The defendant Whiteside Construction Company, Inc., is alleged to be the subcontractor of the defendant DMH Enterprises, Inc., and it is upon this basis that the use plaintiffs seek to recover from the prime contractor and the surety, Glens Falls Insurance Company. It is contended by the defendant DMH Enterprises, Inc., that Whiteside Construction Company is a sub-subcontractor and that the subcontractor is Dr. Earl M. Campbell, or his company, operating under the trade name of Construction Industries of Colorado.

Use plaintiffs maintain that Construction Industries of Colorado, or Dr. Campbell, is not a genuine subcontractor; that the contract between Campbell and DMH and between Campbell and Whiteside are shams and do not constitute the actual relationship between the parties. For the past three days evidence has been taken, most of which pertains to this question as to the nature and character of the relationship. Arguments have been had and this matter now stands submitted.

In addition to the controversy which has been described, we must also decide the issues as between Whiteside Construction Company and DMH. The former has filed a cross-claim alleging that materials and labor which it contributed to the project were used and that payment was not made to it. The contract of Whiteside was terminated prior

to completion. The important issue here is also whether the relationship between DMH Enterprises and Construction Industries was that of prime contractor and subcontractor. Whiteside failed to file a notice within ninety days under the Miller Act and so unless it is held that he was in substance in direct contractual relationship with DMH his cross-claim against DMH must be dismissed.

There are other questions which, if it is concluded that there was not a prime-sub relationship, must await further hearing.

At the outset it must be noted that the contracts here in question were somewhat unusual. Dr. Campbell was, prior to the events here, in the dental practice in Minneapolis. Apparently, he was anxious to become a building contractor and had talked about this to Mr. Darrell M. Hills, the President of DMH Enterprises, Inc., on many occasions. Mr. Hills and Dr. Campbell are married to sisters and were apparently close friends. Campbell noticed in a trade journal that the Air Force was inviting bids in connection with the project in question. With the idea of having some part in this, he communicated the fact to his relative Hills of DMH Enterprises, Inc., whereupon DMH made a bid on the prime contract and obtained it in March.

Whiteside Construction Company has been engaged in carpentry or frame contracting, since 1952. While the bidding was proceeding in connection with the Ent Air Force Housing Project, Whiteside was calculating the framing and was seeking to obtain the subcontract. Thus in April, he talked to Hills about it. Hills had, however, committed himself to Campbell and he referred Whiteside to Campbell as the subcontractor. Whiteside could not make bond and apparently this factor had a good deal to do with the ultimate form which the several relationships among the several

parties finally took. Campbell did not enter into a performance bond either although it does not appear that he was unable to obtain one. Campbell, doing business as Construction Industries, was approved by the Air Force as the subcontractor. Very soon thereafter he entered into a contract with Whiteside whereby Whiteside would perform about ninety-nine per cent of the framing work. At the same time, in order to give him, Campbell, security, Whiteside and his wife executed a note payable to Campbell in an amount sufficient to secure him, Campbell, from any default by Whiteside. It was the understanding that this note would be returned if Whiteside successfully performed his contract to do the framing and carpentry work. Evidence was offered which showed that Campbell was present on the job a good deal of the time. He had other contracts going, but he devoted substantial time and effort in connection with the performance of the contract in question. However, he had no office, he had no crew; his only employee was a part-time superintendent. He used DMH's office facilities and utilized the services of DMH's secretary, a Miss Martin. Hills and his superintendent Sweeney, conferred with Whiteside freely in the day to day work.

The evidence also showed that Campbell sold his dental practice during April of 1964 and finally moved to Colorado Springs around May 1, 1964. He had had some experience in building in the Minneapolis area. While attending college he had acted as superintendent on a construction job and on his own had undertaken the construction of houses. He had not, however, had any experience in carrying on a job of the magnitude of the one here in question. Nevertheless, his name appeared as subcontractor on DMH's organizational chart and formal orders relative to performance of the contract regularly went through channels from Campbell to Whiteside. The suppliers, including the use plaintiffs, be-

came aware of the fact that Campbell had some contractual obligations some time in August, 1964. Nevertheless, after this they supplied material to Whiteside.

Hills was somewhat aware of the liability problem in connection with these contractual relationships because at the outset he wrote to his bonding company, Glens Falls Insurance Company, asking whether it was necessary that the ~~sub~~-subcontractor be bonded. He recevied a reply from Glens Falls saying that inasmuch as he, Hills, was in a remote relationship to suppliers of Whiteside and thus could not be held responsible, it was not necessary that ~~Whiteside~~ [Campbell] have a performance bond.

Other evidence in the trial established that the work progressed successfully at first, but during the ensuing months some of Whiteside's work was unacceptable to the Air Force and these deficiencies had to be remedied.

Finally, on December 17, 1964, Whiteside advised DMH and Campbell that he could no longer carry on the contract, saying that he would need an additional sum of money in order to complete it. Upon that basis he was terminated by Campbell and the latter undertook to complete the contract. According to the evidence he made no profit and, indeed, suffered a loss amounting to approximately Twenty Thousand Dollars. Notwithstanding this, he has not pursued any remedy which he might have had on the note given by Whiteside as security. The amount of Whiteside's contract originally was $447,000.00 with extras which brought it to approximately $480,000.00. The amount payable to Campbell would have been $462,000.00 originally, plus extras. At the time of the termination, on December 18, 1964, Whiteside had received $333,184.00 in advances. At the same time he had paid out some $201,169.00 for labor and

approximately $95,000.00 to suppliers. He owed a substantial amount to the suppliers as of this time. As of this time there was a substantial amount owing to the suppliers, the use plaintiffs, which had been held back by Campbell.

A fact which is particularly impressive is that Mr. Hills virtually negotiated the contract between Campbell and Whiteside. First of all, he brought them together and their agreement came about through telephone conversations which were originally initiated by Hills. Seemingly, it was Hills who designed this unique relationship. To be sure, Campbell had spent a few days in the area and according to him, had made independent calculations, but it seems clear that he accepted the figures which Hills had gathered in connection with the making of his bid and which he had learned in the course of his analysis of the project. It is also to be noted that the suppliers were at the outset in direct contact with Mr. Hills and originally they firmly believed that Whiteside was the subcontractor. Indeed, they realized that Campbell had some function but they never were fully aware of his exact contractual status.

Additionally, the fact that form contracts were signed by both Campbell and Whiteside, which contracts were almost identical and which were prepared by Hills, supports the conclusion that Campbell was something other than a true subcontractor. Finally, the circumstances under which Campbell came into the picture are significant. He was unquestionably a novice and both he and Hills were seeking to obtain some exposure for him. While he did some day to day counseling and supervising, it does not appear from a consideration of all the evidence that he was in truth an intervening subcontractor. Rather, his role was that of a guarantor, or surety, and indeed that was the role in which he finally functioned.

The pertinent provision of the Miller Act, Title 40 § 270b(a) provides a remedy to persons who have furnished labor or material in the prosecution of work provided for in "such contract." In substance then, it gives to a supplier a remedy against the contractor and his surety even though the supplier is not in direct contractual relationship with the prime contractor. This is a broad remedial statute, intended to protect suppliers who have furnished materials which have gone into a job in a situation where the subcontractor proves irresponsible and perhaps has not obtained a performance bond. The case at bar is a classic one for protection of the suppliers and the question is whether the intervention of this additional person, Dr. Campbell, together with the formal written contract executed by him, deprives the plaintiffs of a remedy. It is, of course, axiomatic that parole evidence is admissible to show that the contract was a sham; that it did not create the relationship which it purported to create. It is apparent from the evidence at bar that there was a studied effort on the part of Hills to insulate himself from the suppliers to the subcontractor of the framing and carpentry work. Undoubtedly, there was a design on everyone's part to save bond fees among other things.

It is to be inferred that the contract was not a highly profitable one and that every dollar was significant. Thus, it is to be concluded that the effort was, as indicated, to introduce Campbell to the construction field and to do so on a basis whereby he would not have primary and actual responsibilities. He finally did have to perform, but the way the transaction was designed he was in effect an agent for Hills during the course of his performance.

In concluding that the contract between DMH and Campbell was a sham we are not saying that because the subcontractor has no actual performance responsibilities other than

guarantee that he can not be a subcontractor. If Campbell had been in the business of framing or carpentry contracting and had been brought into the picture on a true arm's length basis, there could be no question about the result. However, the circumstances here presented are, as indicated at the outset of this discussion, peculiar.

Therefore, it is concluded that Whiteside was in substance, if not in form, the contractor; that Campbell was a guarantor, or surety. It, therefore, follows that the use plaintiffs come within the terms and scope of the Miller Act.

The defendant Glens Falls Insurance Company is also liable under its bond.

Whiteside is, of course, entitled to have his case judged in the light of this determination. Since there are, however, independent considerations applicable to Whiteside, we are disposed to postpone this determination until the next hearing.

Inasmuch as the instant determination is not a final judgment, the amount which is due and owing to the use plaintiffs need not be determined. It would appear to be approximately $160,000.00. However, this computation and determination can await the final entry of judgment herein. The use plaintiffs are, of course, entitled to judgment against Whiteside, but the Clerk will postpone entry of such judgment until the exact amounts are determined.

Dated at Denver, Colorado, this Third day of December, A.D. 1965.

By The Court:
WILLIAM E. DOYLE, Judge
United States District Court

Entered on the Docket
December 3, 1965.

APPENDIX B

United States Court of Appeals

TENTH CIRCUIT

JULY TERM, 1967

GLENS FALLS INSURANCE COMPANY,
Appellant,

v.

NEWTON LUMBER & MFG. CO., and
PERFECTION TRUSS CO., INC.,
Appellees.

No. 8779

DMH ENTERPRISES, INC.,
Appellant,

v.

NEWTON LUMBER & MFG. CO., and
PERFECTION TRUSS CO., INC.,
Appellees.

No. 8780

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

H. GAYLE WELLER and NORMAN E. WALTON
for appellants.

ROBERT E. ANDERSON (Horn, Anderson & Johnson, Daniel P. Edwards and Love, Cole & Murphy on the brief)
for appellees.

Before PHILLIPS, LEWIS and HILL, *Circuit Judges.*

PHILLIPS, *Circuit Judge.*

DMH Enterprises, Inc.,[1] on March 27, 1964, entered into a written contract with the United States Air Force, whereby DMH agreed, as the prime contractor, to furnish all labor and materials and do all the work required to construct a 200-unit family housing project near the Ent Air Force Base in Colorado.

DMH, as principal, and Glens Falls Insurance Company,[2] as surety, executed a payment bond, pursuant to the provisions of §1 of the Miller Act, 40 USCA §270a. (a)(2), c. 642, §1, 49 Stat. 793.

On February 26, 1965, an action in the name of the United States for the use and benefit of Newton Lumber & Mfg. Co.[3] and Perfection Truss Co., Inc.,[4] was brought to recover from DMH and Glens Falls on the bond, sums due Newton and Perfection for materials furnished by them to Whiteside Construction Company, Inc.[5]

In the complaint it was alleged that Whiteside Construction was a subcontractor of DMH and such materials "were required by * * * DMH" to carry out its prime contract and were furnished "with the knowledge, consent and approval" of DMH.

In their answer DMH and Glens Falls alleged that Earl M. Campbell, doing business as Construction Industries of Colorado, was a subcontractor of DMH and that Whiteside Construction was a subcontractor of Campbell, and therefore neither Newton nor Perfection was entitled to recover on the bond.

From a judgment in favor of Newton and Perfection, DMH and Glens Falls have taken separate appeals.

---

[1] Hereinafter referred to as DMH.
[2] Hereinafter called Glens Falls.
[3] Hereinafter called Newton.
[4] Hereinafter called Perfection.
[5] Hereinafter called Whiteside Construction.

On April 20, 1964, Campbell and DMH executed a writing which purported to be a subcontract, whereby Campbell agreed to furnish the materials and perform the labor necessary to complete the carpentry and millwork and the installation of weatherstripping and thressholds [sic] in compliance with the requirements of the prime contract.

Campbell and Whiteside Construction executed a writing, dated May 6, 1964, which purported to be a subcontract between Campbell and Whiteside Construction, whereby the latter agreed to furnish the materials and perform the work necessary to complete such carpentry and millwork, which were virtually all of the materials, labor and work which Campbell undertook to furnish under his purported subcontract with DMH.

The case was tried to the court, without a jury.

The trial court found that the contract between DMH and Campbell was a sham; that in substance Campbell was the agent of DMH, and that Whiteside Construction was the subcontractor of DMH.

The following facts were established by substantial evidence:

Darrell M. Hills was the president of DMH. He and Campbell were married to sisters and were close friends. For a time, prior to early May, 1964, Campbell had engaged in the full-time practice of dentistry at Minneapolis, Minnesota. Later, from time to time, he practiced dentistry only part-time and engaged in the construction of houses in Minneapolis. Early in May, 1964, he sold his dental practice and moved to Colorado Springs, Colorado.

Campbell saw an invitation for bids in a Government publication for the construction of the housing project here involved. Being desirous of getting into the contracting

business, Campbell brought the invitation to the attention of Hills. Hills submitted a bid for the housing project, which was accepted, and culminated in the contract of March 27, 1964. Hills and Campbell reached an understanding about the part Campbell would play with respect to the carrying out of the work on the housing project.

Jack L. Whiteside[6] was president of Whiteside Construction. Prior to April 2, 1964, Whiteside called Hills by telephone with respect to bidding as a subcontractor on the "framing" on the housing project. As a reult of the conversation, Whiteside met with Hills at the latter's office in Colorado Springs, Colorado. Hills furnished Whiteside with a set of the plans and specifications for the housing project and they discussed the scope of the work. In the latter part of April, 1964, Whiteside submitted to Hills a bid to furnish certain labor and materials for the project. Hills advised Whiteside his bid was greater than one submitted by another subcontractor and asked him to refigure the job and revise his bid downward. Whiteside did refigure the job and reduced his bid to $452,000. Whiteside advised Hills that Whiteside Construction could not furnish a performance bond. Thereupon, Hills stated that a fee of one per cent would have to be paid to Campbell, and Hills and Whiteside agreed on a final price of $447,500 for the furnishing of the materials and labor embraced in the contract between Whiteside Construction and Campbell, which was the amount of Whiteside's earlier bid, less approximately one per cent.

After the price was agreed on, Hills advised Whiteside that a Mr. Campbell in Minneapolis would sign the contract with Whiteside Construction. Thereafter, Whiteside had a telephone conversation with Campbell. Campbell told Whiteside that Hills had checked Whiteside Construc-

[6] Hereinafter called Whiteside.

tion and Whiteside with their banker and had received a favorable report and that a contract would be drafted. Virtually all the negotiations with respect to the contract between Campbell and Whiteside Construction were carried out between Hills and Whiteside. Hills advised Whiteside his original bid would have to be reduced to meet a bid of another subcontractor, and later advised Whiteside that he and his wife would have to execute a personal note to Campbell for $44,750 to secure Campbell againt loss, and that Whiteside's revised bid would have to be further reduced one per cent to provide a fee of one per cent of the bid to Campbell, because Whiteside Construction could not give a performance bond. Whiteside agreed with Hills to reduce his bid to $447,500.

After the telephone conversation between Whiteside and Campbell, the contract, dated May 6, 1964, was prepared by DMH and submitted to Whiteside. When so submitted, Campbell had not signed the contract and was not present. The contract was signed, "Whiteside Construction Company, Inc. By Jack L. Whiteside, President." It was later signed "Construction Industries of Colorado. By Earl M. Campbell."

Early in 1964, William M. Hardwicke, the general manager of Perfection, submitted to Hills a bid to provide the roof trusses on the housing project. At that time, Hills told Hardwicke he was negotiating with a Mr. Whiteside to furnish the labor and materials for the framing work and that Whiteside Construction was going to be the framing subcontractor. Hills then asked Hardwicke if the prices he had submitted to Hills could be used by Whiteside and Hardwicke said it would be all right. Hardwicke never heard of Campbell until after Perfection had furnished much of the materials to Whiteside Construction and was having difficulty in obtaining payment therefor from Whiteside Construction. Hardwicke advised Hills he was having trouble

collecting from Whiteside Construction and Hills advised him to take the matter up with Campbell. Prior thereto, Hardwicke had been on the job quite often and had never seen Campbell there.

Hills told Vernon M. Hallenbeck, general manager of Newton, that Whiteside Construction would be the framing subcontractor. Hallenbeck testified he saw Campbell on the job from time to time, but believed he was a representative of DMH.

The L & M Builders Supply furnished materials for the housing project. Jack LaRock, the head of that firm, was introduced to Whiteside by a representative of DMH, who told LaRock that Whiteside was the carpentry subcontractor on the job and that all scheduling and delivery would have to be gone over with Whiteside. LaRock had no contracts with Campbell until late in 1964.

When problems arose, as the work progressed, Whiteside talked with Leonard Sweeny, the general superintendent of DMH, or Hills, not with Campbell. Hills and Sweeney frequently gave directions to Whiteside Construction.

Campbell had no workmen on the job until after Whiteside Construction was unable to complete the work under its contract and had left the project in December, 1964. Campbell occupied space with DMH without charge until December 1, 1964, at which time he rented a trailer not being used by DMH. All of Campbell's secretarial work was done by employees of DMH, and Mary Martin, an employee of DMH, kept all of Campbell's records.

We are of the opinion that the evidence of the facts we have narrated afforded ample support for the findings of the trial court, which in substance were as follows: That the contract between DMH and Campbell was a sham;

that Campbell permitted the use of his name in the contract with Whiteside Construction for the benefit of DMH; that there was no intent to impose a contractual obligation on Campbell by the contract of April 20, 1964; that the purpose of using Campbell's name in the contract of May 6, 1964, purporting to be a subcontract between Campbell and Whiteside Construction, and the contract of April 20, 1964, purporting to be a subcontract between DMH and Campbell, was to make it appear that Campbell was a subcontractor of DMH and Whiteside Construction a subcontractor of Campbell, and thereby insulate DMH from liability to materialmen for materials furnished to Whiteside Construction for the housing project; and that Campbell's relationship with DMH was that of agent or employee.

In determining whether Whiteside Construction was a subcontractor of the prime contractor, DMH, or a subcontractor of Campbell, the court properly regarded substance, rather than form. Otherwise, the purpose of the remedial statute, to protect suppliers of materials to the actual subcontractors of the prime contractor, could be defeated by setting up by formal contract a straw man as a subcontractor between the prime contractor and one who in substance and intent is the actual subcontractor.[7]

It is true that the evidence was not wholly free from conflict. There was some evidence in the record from which the court might have drawn contrary inferences or factual conclusions. But when an action is tried to a court without a jury, due regard must be given to the fact that the trial judge has an opportunity to see the witnesses while testifying and observe their demeanor on the stand, and is in a much better position to judge of their credibility than is an

[7] See: St. Paul-Mercury Indemnity Company v. United States, 10 Cir., 238 F.2d 917, 921; Ryan v. Bethlehem Sparrow Point Shipyard, 4 Cir., 209 F.2d 53, 56.

appellate court on a cold printed record.[8] For that reason, a trial judge's findings will not be set aside unless clearly erroneous,[9] and if different inferences reasonably may be drawn from the evidence, the inferences drawn by the trial court will not be set aside unless clearly erroneous.[10]

After a careful examination of the entire record, we are fully convinced that the findings made and the inferences drawn by the trial court are fully warranted by the evidence and are not clearly erroneous.

Finally, Glens Falls and DMH contend that Newton and Perfection were estopped to deny that Campbell was the subcontractor of DMH and that Whiteside was the subcontractor of Campbell.

Rule 8(c) of the Fed. Rules Civ. Proc. 28 USCA, provides that estoppel is an affirmative defense and must be set forth affirmatively in the pleading of the party who asserts it. Here, neither Glens Falls nor DMH pleaded estoppel in their answers.

On December 1, 1965, after the introduction of evidence had been completed and all parties had rested, counsel for Glens Falls stated:

> "* * * I would like to make a motion to the Court to amend our pleadings to include the de-

---

[8] Fed. Rules Civ. Proc. rule 52(a), 28 USCA; McSorley's, Inc. v. United States, 10 Cir., 323 F.2d 900, 902-903; St. Paul-Mercury Indemnity Company v. United States, 10 Cir., 238 F.2d 917, 922; Carter Electric Co. v. The Travelers Indemnity Co., 10 Cir., (decided Aug. 9, 1967) ___F.2d ___, ___; British American Assur. Co. v. Bowen, 10 Cir., 134 F.2d 256, 260.

[9] United States v. Oregon State Med. Soc., 343 U.S. 326, 339; Fed. Rules Civ. Proc. rule 52(a), 28 USCA; Friedman v. Fordyce Concrete, Inc., 8 Cir., 362 F.2d 386, 387; Kerr v. C.I.R., 9 Cir., 326 F.2d 225, 229, c.d. 377 U.S. 963; Los Angeles Extension Co. v. United States, 9 Cir., 315 F.2d 1, 3; Todd v. United States, 10 Cir., 362 F.2d 531, 532.

[10] Mitsugi Nishikawa v. Dulles, 9 Cir., 235 F.2d 135, 141; Southwestern Investment Co. v. Cactus Motor Co., 10 Cir., 355 F.2d 674, 676; Wilsey-Bennett Trucking Company v. Frost, 10 Cir., 275 F.2d 144, 147; Lindsey v. Oregon-Washington Plywood Company, 10 Cir., 287 F.2d 710, 711; Friedman v. Sealy, Inc., 10 Cir., 274 F.2d 255, 258; Saturn Oil & Gas Co. v. Northern Natural Gas Co., 8 Cir., 359 F.2d 297, 303.

> fense of estoppel against the use plaintiffs, which I think the evidence has shown."

That was the first time in the proceedings where the defense of estoppel was mentioned.

In response to such motion, the court ruled that Glens Falls and DMH should prepare and tender a formal amendment to their respective answers, which we think meant a written motion, setting forth the proposed amendment and asking leave to file it. We think the court's ruling was proper.

The record fails to show that either Glens Falls or DMH at any time prepared and tendered a formal amendment to their respective answers or otherwise took any further action to secure permission to amend their answers by a formal pleading setting up estoppel.

An order entered on February 3, 1966, granting leave to Glens Falls and DMH to amend their answers in nowise refers to estoppel, and even if it did, no amendment to their respective answers setting up estoppel was ever filed by Glens Falls and DMH.

Glens Falls and DMH next mentioned estoppel at a hearing on February 3, 1966. After counsel had presented a brief argument on the defense of estoppel, the court stated with respect to such defense:

> "* * * the difficulty * * * insofar as it depends on factual material, is that they have had no opportunity to respond to it. It comes at this late stage, you know. Some of these arguments you make are just not valid, because they have had no opportunity to put in evidence to refute your legal theory * * *."

Counsel for Glens Falls and DMH then stated:

"* * * this is based solely upon the evidence that was brought forth at the trial * * *."

The court then stated:

"* * * But, the shape of the legal issues determines what kind of evidence you put in, lots of times. * * *"

Thereafter, Glens Falls and DMH filed a motion for a new trial, and as one of the grounds therefor set up that the court erred in not holding the use plaintiffs were barred from recovery by estoppel. The court denied the motion for a new trial.

A careful examination of the evidence and other pertinent parts of the record of the proceedings below leads us to conclude that the defense of estoppel was not pleaded, was not timely asserted, and was not established by the evidence adduced at the trial.

For the reasons indicated, we affirm the judgments in favor of Newton and Perfection.